In the District Court of Appeal

SECOND APPELLATE DISTRICT

State of California

LIEBMANN BREWERIES, INC., a Corporation,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

UPA PICTURES, INC., UPA ENTERPRISES and COLUMBIA PICTURES CORPORATION,

Real Parties in Interest.

Respondent's Points and Authorities in Opposition to Alternative Writ of Mandate.

STATEMENT OF THE CASE.

This proceeding seeks to compel respondent Court to vacate and set aside its order for service of process upon the petitioner, a foreign corporation, by serving the Secretary of State, and to quash service of summons.

THE FACTS.

The petitioner, a foreign corporation with offices in the State of New York, is engaged in the business of manufacturing beer and is one of the defendants in the action entitled "UPA PICTURES, INC., *et al.*, v. FOOTE, CONE & BELDING, INC., *et al.*," Superior Court No. 698,-923, pending in respondent Court; that petitioner licensed Rheingold Brewing Company, a California corporation,

to manufacture and sell its beer. The action is for breach of contract between the plaintiffs and the defendants involving the use of certain advertising material. The petitioner, having no office in this state and not having appointed an agent for the service of process, was served by serving the Secretary of State pursuant to an order made therefor by respondent Court on November 28, 1958. Thereafter, petitioner moved said Court to quash said service upon the ground that it does not transact business within the State of California. Said motion was heard upon affidavits on behalf of the petitioner in support thereof and counteraffidavits on behalf of the plaintiffs in opposition thereto. Upon the hearing of said motion it was denied by respondent Court.

Point I.

Petitioner Has Failed to Set Forth Sufficient Facts From Which This Court Can Determine Whether Respondent Court Abused Its Discretion in Denying Said Motion.

The only evidence contained in the petition for writ of mandate on the question of doing business are affidavits submitted on behalf of the petitioner, Exhibits "E," "F" and "G." The petition alleges in paragraph VI thereof, on page 4, that the real parties in interest filed affidavits and offered certain portions of depositions in opposition to petitioner's motion. Therefore, respondent Court had before it conflicting evidence on the question of doing business, and such conflicting evidence should have been presented to this Court in the petition for writ of mandate. In the absence thereof, it must be presumed that there was substantial evidence before respondent Court to support its order denying the motion.

POINT II.

THIS COURT SHOULD DENY THE ALTERNATIVE WRIT WHERE THE PETITION WHOLLY FAILS TO PROVIDE A BASIS UPON WHICH THE LOWER COURT'S ACTION CAN BE EVALUATED.

Favorite v. Superior Court, 52 Cal. App. 316, 318-319;

3 Witkin, "California Procedure" Section 56, p. 2545.

POINT III.

THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT RESPONDENT COURT'S ORDER DENYING THE MOTION TO QUASH.

The affidavit of Glenn Warner, filed in opposition to said motion, contains, among other things, the following statements:

"4. Defendant Liebmann owns 5/6ths of the capital stock of Continental Holding Corporation, which, in turn, owns all of the stock of defendant Rheingold. Philip Liebmann is the President of defendant Liebmann and likewise is the President of defendant Rheingold. The members of the Board of Directors of defendant Rheingold are likewise members of the Board of Directors of defendant Liebmann."

"6. On or about November 30, 1955, defendant Foote, Cone & Belding, Inc. executed a contract with plaintiffs UPA Enterprises, Inc. and Columbia Pictures Corporation 'on behalf of our client Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called "client") and likewise entered into an agreement with plaintiff UPA Pictures "on behalf

of our client Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called 'Client').'"

"9. During a period of approximately two years, Liebmann loaned key employees to Rheingold and, as Philip Liebmann testified, '. . . Over a long period of time a great many technicians were lent to the company.'. All of these technicians with only three exceptions remained employees of Liebmann throughout the time that they were made available to Rheingold in California. Only three actually moved to California, the rest maintaining their homes in the New York area. Moreover, all of those technicians (with the exception of one who severed his relationship with Liebmann and moved to California) returned to the New York plant of defendant Liebmann upon the termination of the activities of defendant Rheingold in California."

"10. During a period of approximately six months Liebmann processed yeast compounds in New York and shipped them to Rheingold in California where they were utilized by Rheingold to brew its beer."

"15. Liebmann continuously sent its representatives into the Rheingold plant to make inspections and tests of facilities, equipment, materials and product."

"18. The license agreements provided that Liebmann would own all advertising and promotional ideas developed by Rheingold and that all advertising material would be copyrighted in the name of Liebmann."

"22. Throughout the period of negotiations relating to the contracts and during the period of time

those contracts were being performed, Philip Liebmann met with representatives of plaintiffs on several occasions in California but never at the offices of Rheingold."

"23. During the period from September, 1955, until May, 1956, Byron Mayo of Foote, Cone & Belding, Inc. met in California with Philip Liebmann on at least sixty different occasions."

"31. Dr. Hermann Schuelein, the Chairman of the Board and chief executive officer of Liebmann in 1955 conferred with plaintiff in California relating to the execution of the contracts in issue and approved newspaper advertising for Rheingold beer in California and New York."

The affidavit of Herbert D. Klynn substantiates some of these statements and includes additional statements pertinent to the question of doing business.

From these statements not only could respondent Court conclude that petitioner was doing business in the State of California, but also that the defendant Rheingold Brewing Company was the alter ego of Liebmann Breweries. With this evidence before respondent Court it was justified in denying petitioner's motion.

Respectfully submitted,

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By WM. E. LAMOREAUX,